Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

FIDENCIO RAMOS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the District Court erred in denying Petitioner's Request for a *Franks* hearing to challenge the truthfulness of the affidavit supporting the wiretap order?

PARTIES TO THE PROCEEDING

The petitioner is Fidencio Ramos, Jr. The Respondent is the United States of America. Other party in the lower courts was defendant-appellant, Aldo Ramos.

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OPINIONS BELOW

The Opinion of the Court of Appeals dated November 17, 1995 is attached hereto as Appendix "A". The order denying a petition for rehearing dated January 9, 1996 is attached as Appendix "B".

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment provides in pertinent part that people have the right to: "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and that no warrants shall be issued but upon *probable cause* supported by *oath or affirmation* particularly describing the place to be searched and the person or things to be seized." (Emphasis Added)

Title 18 U.S.C. Section 2518(1)(c) states in relevant part that each application for a wiretap authorization shall include:

> "A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Title 18 U.S.C. Section 2518(3)(c) states that in issuing a wiretap authorization order, the judge must determine whether:

> "Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

See also *United States v. Santora*, 600 F.2d 1317, 1321 (9th Cir. 1979); *United States v. Spagnuolo*, 549 F.2d 705 (9th Cir. 1977); *United States v. Kalustian*, 529 F.2d 585 (9th Cir. 1975); *United States v. Lillia*, 699 F.2d 99 (2nd Cir. 1983).

STATEMENT

Petitioner Fidencio Ramos, Jr. was indicted in the United States District Court along with Aldo Ramos and Theodoro Ramos. The indictment charged all three with: conspiring to distribute a mixture or substance containing a detectable amount of cocaine in violation of Title 21, United States Code, Section 841(a)(1); distributing a mixture or substance containing a detectable amount of methamphetamine in violation of Title 21, United States Code, Section 841(a)(1); and distributing a mixture or substance containing a detectable amount of marijuana in violation of Title 21, United States Code, Section 841(a)(1) (Count 1); knowingly and intentionally distributing a quantity in excess of 500 grams of a mixture or substance containing a detectable amount of cocaine on or about September 20, 1992 in violation of Title 21 United States Code, Section 841(a)(1) (Count 2); knowingly and intentionally distributing a quantity in excess of 500 grams of a

mixture or substance containing a detectable amount of cocaine on or about September 20, 1992 in violation of Title 21 United States Code, Section 841(a)(1) (Co··nt 2); knowingly and intentionally distributing a quantity in excess of 100 grams of methamphetamine on or about October 11, 1992 in violation of Title 21, United States Code, Section 841(a)(1) (Count 3); knowingly and intentionally distributing a quantity in excess of 100 grams of methamphetamine on or about June 15, 1993 in violation of Title 21 United States Code, Section 841(a)(1) (Count 4); and, knowingly and intentionally possessing with intent of distributing a quantity in excess of 100 grams of methamphetamine on or about September 3, 1993 in violation of Title 21, United States Code, Section 841(a)(1) (Count 5).

Petitioner and his co-defendants were being investigated by the Federal Bureau of Investigation. The investigation was progressing in a productive manner, however the F.B.I. prematurely sought a wiretap order from the United States District Court for the Central District of California. In its application, the government asserted that no further information was able to be gathered about the "Ramos organization" and that a wiretap was necessary. The warrant for the wiretap was granted and Petitioner was subsequently arrested.

Criminal proceedings were initiated against Petitioner. During the proceedings, Petitioner requested a *Franks* hearing to challenge the truthfulness of the affidavit supporting the wiretap order. This request was denied and Petitioner later pled guilty to one count of possession with intent to distribute methamphetamine in

violation of Title 21 United States Code, Section 841(a)(1). He was sentenced to 121 months in custody.

Petitioner appealed the district court decision denying his motion for a *Franks* hearing and the process used to calculate his sentence. Petition's petition for rehearing was denied.

REASON FOR GRANTING THIS PETITION

THE DISTRICT COURT ERRED IN DENYING PETITIONER'S REQUEST FOR A FRANKS HEARING. THE AFFIDAVIT SUPPORTING THE APPLICATION FOR THE WIRETAP AUTHORIZATION ORDER CONTAINED MISLEADING STATEMENTS.

The petition for certiorari should be granted because there are numerous statements contained in the Appellant's Excerpt of Record that suggest that the case was progressing and that the request for the wiretap authorization order was premature. The law governing the issuance of a wiretap order and whether an affidavit supporting the application for the order can be challenged is set forth in Title 18 U.S.C. Sections 2518(1)(c), 2518(3)(c) and in *Franks v. Delaware*, 438 U.S. 154 (1978). The holding in *Franks* and the surrounding cases that support Petitioner's request for certiorari will be discussed in detail later.

The investigation of Aldo Ramos would have produced fruitful information had the investigation continued. After the undercover agent was introduced to Aldo Ramos, Ramos stated that he was capable of supplying cocaine and methamphetamine at a reasonable price. (ER

74, 78). He also continued to keep in contact with the agent by meeting him in public places to discuss the purchase of drugs and by returning his phone calls whenever he was paged. (ER 18, 19, 30, 32, 34, 44, 49). More importantly, Aldo Ramos felt relaxed in the agent's presence, and at times, would discuss how his drugs were transported into the country. (ER 17, 20). Clearly, the investigation was moving forward since trust was established between the parties and it would have eventually led to important information had the agent continued with the investigation.

The statutory language of 18 U.S. C. §§ 2518(1)(c) and 2518(3)(c) were interpreted by the United States Supreme Court in *United States v. Kahn*, 415 U.S. 143, 153 (1974). In *Kahn*, the Supreme Court stated that "the language of 2518(1)(c) and 2518(3)(c) is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." Also, the United States Supreme Court held in *United States v. Giordano*, 416 U.S. 505, 515 (1974) that Sections 2518(1)(c) and 2518(3)(c) have been deemed to be designed only to ensure that wiretapping is not "routinely employed as the initial step in criminal investigation." Thus, under the authority of *Kahn* and *Giordano*, the government should not have been granted the wiretap order since the investigation was progressing and was likely to produce useful information.

Another factor that suggests that traditional investigative techniques would have exposed criminal activity if any existed, was an offer of proof from the experienced police investigator. This individual is very familiar with routine investigative procedures used to infiltrate drug

organizations. He stated in his sworn declaration that traditional methods of investigation *had not been tried* and had not yet failed. (ER 140-142). Rather, the declarant stated that traditional methods in a drug investigation were not tried at all. For instance, during an investigation, it is necessary to make numerous buys in reasonably close proximity to one another. (ER 141). In this case, the undercover agent purchased narcotics from Aldo Ramos on three separate occasions occurring over a nine month period. (ER 141). Furthermore, the undercover agent also ignored avenues of investigation that appeared productive and fruitful. Trust was established between Aldo Ramos and the undercover agent and they discussed numerous times the possibility of entering into a 50/50 joint methamphetamine investment. (ER 92). Had the agent continued to work in an undercover capacity and formed a partnership with Aldo Ramos, the government possibly would have been able to further their investigation and to learn more about the group's suppliers, customers, and associates. Clearly, the statements contained in the affidavit concerning the necessity for the wiretap order were false and misleading because traditional investigative techniques were readily available and again, would have eventually led to important information.

Several cases have dealt with the issue of whether a defendant can challenge the truthfulness of an affidavit supporting a search warrant. The United States Supreme Court has addressed this issue in *Franks v. Delaware*. In *Franks*, a defendant was charged and convicted in state court of rape, kidnapping and burglary. Prior to defendant's trial, his attorney filed a motion to suppress certain evidence that was seized pursuant to a search

warrant from defendant's residence. The attorney also challenged the veracity of certain statements made in the affidavit supporting the warrant. *Id.* at 154. The trial court denied defendant's motion and the defendant was later convicted. On appeal, the Delaware Supreme Court affirmed the lower court's ruling and held that a defendant under no circumstances may challenge the veracity of a sworn statement used by the police to procure a search warrant. *Id.* at 154.

The United States Supreme Court reversed the Delaware Supreme Court and articulated the circumstances in which it is proper for one to challenge the veracity of an affidavit. In *Franks*, the United States Supreme Court held that:

> Where the defendant makes a *substantial preliminary showing* that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. (Emphasis Added)

United States v. Flores, 679 F.2d 173 (9th Cir. 1982). See also *United States v. Maher* 645 F.2d 780, 782 (9th Cir. 1981). In

short, the holding of *Franks* requires one to establish: 1) allegations of deliberate falsehood or of reckless disregard for the truth and 2) the allegations must be accompanied by an offer of proof such as an affidavit from witnesses.

The holding in *Franks* was also adopted by the court in *United States v. Ippolito*, 774 F.2d 1482 (1985). In *Ippolito*, the district court suppressed evidence that was derived through the government's use of a wiretap. The evidence was suppressed because the court had discovered that the officer had made "intentionally false, reckless or misleading" statements in his application for the wiretap order. In suppressing the evidence the *Ippolito* court held that the *Franks'* decision applies to wiretap orders and that false and misleading statements concerning the necessity for a wiretap order were material and the deception called for suppression. See also *United States v. Simpson*, 813 F.2d 1462 (9th Cir. 1987). The court also stated:

> Although the government need not pursue every alternative means of investigation, neither should it be able to ignore avenues that appear both fruitful and cost-effective. *Ippolito* at 1486.

The holdings of *Franks* and *Ippolito* are applicable to the present case. Here, the actions of the government intruded upon Petitioner's reasonable expectation of privacy because the government made misleading statements concerning the necessity for the wiretap order. In the application, the government alleged that "normal investigative techniques including surveillance, the use of informants, undercover officers, trashcovers, pen registers, toll records, grand jury investigations, or interviews with RAMOS ORGANIZATION members have been tried

and have failed, are reasonably unlikely to succeed if tried or are too dangerous to try."(ER 138)

This is clearly not true. The statements made by the undercover agent in his affidavit for the wiretap order strongly suggest that traditional techniques were available. As stated previously, this assumption is derived from the fact that Aldo Ramos trusted the agent and revealed important information regarding his drug operations. Thus, under the authority of *Ippolito*, the government should not have been granted the wiretap order since the investigation was progressing and was likely to produce useful information.

Finally, the Federal Bureau of Investigation and the Los Angeles Police Department are large police agencies with unlimited resources that have the manpower and the money to carry out investigations that appear to be potentially productive. These agencies should not be allowed to abruptly end an ongoing investigation that is likely to produce useful information whenever they feel the desire not to investigate any longer. Thus, they should not be allowed to circumvent the law and intrude upon one's reasonable expectation of privacy by arguing that traditional investigative techniques have been tried and have failed, when in fact, they have not been tried at all.

It is quite apparent that the wiretap order was sought in an effort to save the government time. Although the government has tried certain investigative procedures, their efforts to infiltrate the group were too quickly abandoned and prematurely labeled impossible. Thus, under

the authority of *Franks* and the surrounding cases discussed above, the district court erred in denying Petitioner's request for a *Franks* hearing to challenge the truthfulness of the affidavit supporting the wiretap order.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Joseph T. Vodnoy
Attorney for Petitioner
Fidencio Ramos, Jr.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ALDO RAMOS, Defendant-Appellant.	No. 94-50564 D.C. No. CR-93-00829-ER MEMORANDUM*
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FIDENCIO RAMOS, JR., aka: FIDENCIO RAMOS, Defendant-Appellant.	No. 94-50617 D.C. No. CR-93-00829-ER(VT)-2 (Filed Nov. 17, 1995)

Appeal from the United States District Court for the Central District of California, Edward Rafeedie, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Submitted November 14, 1995**
Pasadena, California

Before: FARRIS, BRUNETTI and KOZINSKI, Circuit Judges

Aldo Ramos appeals the district court's calculation of his sentence following a guilty plea to one count of possession of cocaine with intent to distribute and two counts of possession of methamphetamine with intent to distribute, all in violation of 21 U.S.C. § 841(a)(1). Fidencio Ramos, Jr., Aldo's brother and co-defendant, entered a conditional plea of guilty to one count of possession of methamphetamine with intent to distribute. Fidencio appeals the district court's denial of his request for an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and the district court's calculation of his sentence.

I. Aldo Ramos

Aldo is correct that *United States v. Buchanan*, 59 F.3d 914 (9th Cir. 1995), compels the conclusion that his apparently valid waiver of his right to appeal is not enforceable. However, Aldo's arguments regarding the district court's § 3B1.1(a) four-level enhancement for Aldo's role as an organizer or leader in the organization demonstrate, at best, that the facts upon which the district court relied were susceptible to more than one interpretation.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

Because he has failed to demonstrate that the district court's finding was clearly erroneous, we must affirm. *See United States v. Monroe*, 943 F.2d 1007, 1019 (9th Cir. 1991) (stating that a district court's finding that a defendant is an organizer or leader in the criminal activity is a question of fact reviewed for clear error).

II. Fidencio Ramos, Jr.

The district court's decision to deny Fidencio's *Franks* motion without an evidentiary hearing is reviewed de novo. *United States v. Homick*, 964 F.2d 899, 904 (9th Cir. 1992). While Fidencio contends that the declarations submitted by his expert sufficiently establish that the wiretap affidavits contained knowing or reckless misrepresentations with respect to the "necessity" for the wiretap, we agree with the district court that his expert's declarations amounted merely to the opinion of another law enforcement officer questioning the decisions of the investigator and did not establish that any of the representations in the wiretap affidavits were knowingly or recklessly false. The denial of Fidencio's *Franks* motion without a hearing was therefore proper. *Franks*, 438 U.S. at 171-72; *see United States v. Valencia*, 24 F.3d 1106, 1109 (9th Cir. 1994) (stating that, in order to obtain a *Franks* hearing, a defendant must make a "substantial preliminary showing" that the affidavit contains intentionally or recklessly false statements).

As far as Fidencio's appeal of the district court's sentencing calculation, the district court correctly applied the rule of *United States v. Alfeche*, 942 F.2d 697, 698-99

(9th Cir. 1991), in separating the amount of "pure" methamphetamine from the methamphetamine mixture for the purposes of calculating Fidencio's sentence. As Fidencio concedes, we are bound to follow *Alfeche*. What is more, we see nothing wrong with the *Alfeche* rule and thus decline his suggestion that we call for en banc reconsideration.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FIDENCIO RAMOS, JR., aka: FIDENCIO RAMOS, Defendant-Appellant.	No. 94-50617 D.C. No. CR-93-00829-ER(VT)-2 ORDER (Filed Jan. 9, 1996)

Before: FARRIS, BRUNETTI and KOZINSKI, Circuit Judges

Appellant's petition for rehearing is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR-93-00829-ER

UNITED STATES OF AMERICA,
Plaintiff,
v.
FIDENCIO RAMOS, JR.,
Defendant.

REPORTER'S EXCERPTED TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, JULY 27, 1994

THE COURT: . . . FIRST, I HAD EARLIER DENIED YOUR RIGHT TO HAVE AN EVIDENTIARY HEARING TO DISPUTE THE VALIDITY OF THE WIRE TAP AND PAGER INTERCEPTOR. AND I AT THAT TIME STATED TO YOU THAT YOU COULD BRIEF THE ISSUE WHETHER THE HEARING WAS AN APPROPRIATE THING IN LIGHT OF WHAT IT WAS THAT YOU WANTED TO DEVELOP AT THE HEARING. I HAVE NOW READ AND CONSIDERED WHAT HAS BEEN FILED BY YOU AND THE GOVERNMENT. . . . THERE WILL BE NO HEARING.